No single flagship case crystallizes the First Amendment's hostility to government efforts to "improve the conduct and discourse of politics" or to "combat negative campaigning." Time and again, however, the Court has extolled our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[113] While the Court has acknowledged that there is no constitutional value in false statements of fact,[114] it has held that the commitment to uninhibited debate is a virtual trump that substantially limits the ability of public officials to recover damages from defendants who utter false statements about their official performance.[115] Time and again, too, the Court has affirmed that the freedoms protected by the First Amendment are "delicate and vulnerable" and must have adequate "breathing space" to survive.[116] For example, the Court is convinced that trying to protect public discourse from "outrageous" speech would have an "inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[117] Accordingly, a public official may not recover damages for intentional infliction of emotional distress without showing that the offending publication contains a false statement made in reckless disregard of the truth.[118] And time and again the Court has defended the proposition that "governmental bodies may not prescribe the form or content of individual expression":[119]

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[120]

In light of those often eloquently stated and consistently affirmed First Amendment principles, the second goal sought by proponents of free TV for candidates appears to be out of constitutional bounds. No precedent supports the use of government's coercive power to improve the discourse of politics and combat negative campaigning, whereas the precedents prohibiting pursuit of such a goal are abundant and unwavering.

Buckley v. *Valeo* provides limited guidance on the issue of whether the government may pursue the third goal asserted in behalf of free TV, namely that of "equalizing the playing field." The Court in *Buckley* expressed hostility to equalization efforts: "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to

113. New York Times Co. *v.* Sullivan, 376 U.S. 254, 270 (1964).

114. *See, e.g.*, Gertz *v.* Robert Welch, Inc., 418 U.S. 323, 344 (1974).

115. *See, e.g.*, New York Times Co. *v.* Sullivan, 376 U.S. 254 (1964).

116. NAACP *v.* Button, 371 U.S. 415, 433 (1963).

117. Hustler Magazine *v.* Falwell, 485 U.S. 46, 55 (1988).

118. *Id.*

119. Cohen *v.* California, 403 U.S. 15, 24 (1971) (reversing the conviction, for disturbing the peace, of a defendant who was observed in the corridor of a municipal court building, wearing a jacket bearing the words "Fuck the Draft").

120. *Id.*

the First Amendment."[121] Providing free TV for all federal candidates does not necessarily fall under that prohibition. Mandating that broadcasters provide free TV time would restrict *their* speech—or at least their editorial discretion—but it would not do so to enhance the relative voice of their *competitors*. It would attempt to equalize the relative voices of candidates vis-à-vis one another, but in doing so it would not restrict any *candidate's* speech.

Under *O'Brien*, though, the goal of "equalizing the playing field" of speech opportunities enjoyed by candidates vis-à-vis one another seems likely to be found to be a goal that is not unrelated to the suppression of free expression, since the need to equalize is a function of differences in communicative impact that would presumably arise absent equalization. A conclusion that such is the case would not necessarily be fatal to the attempt to pursue the goal, but it would dictate that the Court engage in explicitly strict scrutiny.[122]

Only the fourth of the goals that free TV would supposedly accomplish—namely, the goal of restoring the confidence of the American people—seems likely to be unequivocally endorsed by the Court. The Court has never held such a goal to be illegitimate. Indeed, in one case where a similarly formulated goal—that of "preventing diminution of the citizen's confidence in government"[123]—was asserted in defense of a prohibition of corporate campaign speech, the Court called it a goal "of the highest importance."[124] Despite that, the Court determined that the interest was

121. *Buckley*, 424 U.S. at 48–49.

122. For a discussion of how a finding that a governmental interest is not unrelated to the suppression of free expression "switches" the Court to a "substantially more demanding" level of scrutiny, *see* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

123. First National Bank *v.* Bellotti, 435 U.S. 765, 787 (1978).

124. *Id.* at 789.

insufficient to sustain the speech regulation there at issue, because no evidence existed to support the government's claim that democratic processes were being undermined by the practices in question.[125]

The Relationship of Means to Ends. Assume *arguendo* an unlikely proposition, namely, that the Court would find all four of free TV's posited goals to be important and constitutionally legitimate. The next task for proponents would be to demonstrate that the goals are real, not merely conjectural or rhetorical, and that free TV would achieve them in a direct and immediate way. Here, unless they are able to come up with more substantial evidence than they have produced to date, the proponents are likely to founder. Indeed, it is as apt to note of the free TV proposals as of the recent spate of campaign finance regulations that they are neither

> premised on empirical analysis, nor derived from established postulates, nor defended in terms of predictions about testable results. Rather [they] rest on pejorative and highly charged rhetoric, [are] formulated in ill-defined but evocative terms, and . . . defended with extravagant claims about benign effects. Yet upon analysis, the picture the [free TV proponents] paint—both of political reality and of the goals of reform—is so vague that it begs all the important questions.[126]

Merely posing some of the questions that the free TV proposals beg makes the analytical point. First, even assuming that reforming "skyrocketing costs of running" for office is a legitimate legislative project, how could giving federal candidates free TV time keep overall costs down?

125. *Id.*

126. BeVier, *Campaign Finance "Reform," supra* note 109, at 24.

Since any effort actually to *prohibit* candidates from continuing to spend on their campaigns would run into an impenetrable constitutional barrier,[127] what besides wishful thinking would prevent candidates from using the money saved by free TV to engage in other expensive campaign maneuvers?

Second, again confronted by the impenetrable constitutional barrier to candidate spending limits, so that candidates with access to more resources could continue to spend more even after accepting free TV, how would providing free TV to less well-financed candidates "equalize the playing field"? Even if proponents somehow found a way to equalize the total spending of candidates accepting free TV, how would the incumbent's already considerable advantage be "equalized" away?

Third, given that direct regulations of, or prohibitions regarding, the content and quality of political discourse are placed beyond legislative power by the First Amendment, how would merely providing free TV time to candidates "foster a campaign discourse that favors words over images and substance over sound bites"?

Fourth, what evidence exists that citizens were actually and to their detriment *misled* by what proponents of free TV claim were "deceptive" ads in the 1996 campaign or at other times? And even if citizens were, why is it not enough that the candidates are free to engage in counter speech? (Do we really want the government to monitor the truthfulness of campaign speech, to begin canvassing past campaign speech and voters' reaction to it, to determine whether all the claims were true and, if not, whether citizens were misled by false claims? The implications of such an inquiry are truly devastating to the idea of a "self-governing" people.) Moreover, if citizens have recently become more cynical about politics and have lost some of

127. *Buckley*, 424 U.S. at 82.

their confidence in government, what evidence supports the claim that such a phenomenon is accounted for by the way politicians *campaign* rather than by the way they *behave when in office*?

Finally, upon what evidence do advocates of free TV think that "there is a real hunger for political information,"[128] and what makes them think that free TV would satisfy that appetite? Upon what evidence do they conclude that citizens hungry for political information cannot find plenty to satisfy them from the rich and varied menu now provided by the free—that is, genuinely *un*regulated—political debate?

If the Court takes at all seriously its obligation to call what appears on the present state of the evidence to be a rhetorical bluff of free TV's proponents—if it truly requires them to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"[129]—the proponents will have to come up with well-founded answers to the kinds of questions posed above. They will, in other words, have to offer a defense much more solid than the vague generalities and unsupported assertions about causes and effects that they have offered so far.

The First Amendment Rights of Candidates. The implicitly skeptical empirical premise of the foregoing rhetorical questions is that, unless it is bolstered by significant additional constraints, free TV alone will do little to accomplish its proponents' highly touted goals. Accordingly, the proposals contemplate regulating the speech of candidates who accept free TV by exacting some kind of quid pro quo from them: candidates must agree to appear in person, to

128. James Bennett, *Perils of Free Air Time*, N.Y. TIMES, Mar. 13, 1997, at A1 (quoting Paul Taylor).

129. *Turner I*, 512 U.S. at 664.

face the camera, to talk for a specified length of time, or to accept limits on overall campaign spending, or they must agree to all of those conditions. Restrictions like those—on the quality, quantity, content, or format of political campaign speech—would surely not be tolerated if Congress or the FCC attempted to impose them as free-standing rules.[130] Proponents of free TV may think that the restrictions will enjoy a different constitutional fate if they are defended as reasonable conditions on candidates' receipt of governmentally provided subsidies. But proponents would be mistaken.

Proponents would begin their defense of the conditions by analogizing them to provisions implicitly endorsed by the Court in *Buckley*, when it qualified its otherwise unequivocal rejection of expenditure limitations:

> Congress may engage in public funding of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.[131]

Proponents of free TV would also cite *Rust* v. *Sullivan*,[132] in which the Court sustained against First Amendment challenge a Department of Health and Human Services "gag rule" that prohibited recipients of federal family planning funds from providing abortion information. The Court held that the gag rule was a permissible means of safeguarding the integrity of the government program for which taxpayer funds were being expended.[133]

130. *See* text accompanying notes 97–105, *supra*.

131. *Buckley*, 424 U.S. at 57 n.65.

132. 500 U.S. 173 (1991).

133. *Rust*, 500 U.S. at 196 ("the Government is simply insisting that public funds be spent for the purposes for which they were authorized").

Proponents of free TV would reason that because candidates would receive free TV time, *Buckley* and *Rust* would support the imposition on them of quality, content, or format restrictions to achieve the purposes of the government program. But neither *Rust* nor *Buckley* would support them because the key fact in both cases was that the subsidy was supplied *by the taxpayers*. The key fact about free TV, on the other hand, is that the subsidy would be provided *by the broadcasters*.

Indeed, analysis of free TV in terms of *Buckley* and *Rust* exposes the proposals for the constitutional shell game that they are. Broadcasters would have no First Amendment rights to resist compliance with the free TV mandates, proponents say, because spectrum scarcity or some variation of the public ownership trope permits government to regulate licensees' speech in the public interest; they would have no Fifth Amendment right to compensation because the "property" to be taken does not "belong" to them; and candidates would have no First Amendment right to resist compliance with the format, quality, or content controls, because they would be permitted to speak for free. It does not require X-ray vision to detect the conceptual emptiness of that series of tricky doctrinal maneuvers. The First Amendment edifice of political freedom that the Court has so painstakingly constructed seems unlikely to yield to such transparently feeble arguments on behalf of overbearing government control.

The Proposals Assessed

The basic idea of free TV for political candidates lacks a constitutional foundation. Nor can it be justified in policy terms. Those conclusions do not fundamentally change depending on which particular proposal one considers: the

constitutional devil in those proposals lurks in their very conception, while the policy devil lurks in the mismatch of ends and means that inevitably follows when policymakers attempt to give real-world shape to basically ill-conceived notions. Since that is the case, quibbling over regulatory detail at this stage of the debate would be unproductive. Thus, this monograph does not undertake either to describe or to examine the particulars of any of the proposals. Indeed, President Clinton's call for free TV for political candidates in his 1998 State of the Union address, and the surfacing of such a proposal by FCC Chairman William Kennard immediately thereafter, suggest that the details of perhaps the most prominent proposals have yet to be determined.[134]

The Proposals. To enhance appreciation of the constitutional and policy issues that they raise, I briefly summarize the most prominently touted of the plans—two that have been introduced in Congress and one that has been advocated by a private group.

The McCain-Feingold Bill. One version of the McCain-Feingold Bipartisan Campaign Reform Act of 1997, S. 25, included a free TV time provision. It would have amended section 315 of the Communications Act of 1934,[135] the "equal time for candidates" provision, to require broadcasting stations within a candidate's state or an adjacent state to provide "eligible" Senate candidates with thirty minutes of free prime broadcast time.[136] To become "eligible" for the time, Senate candidates would have had

134. Lawrie Mifflin, *State of the Union: Political Broadcasts; F.C.C. Plans to Take Look at Free Political Broadcasts*, N.Y. TIMES, Jan. 29, 1998, at A19.

135. 47 U.S.C. § 315.

136. S. 25, 105th Cong., 2d Sess. § 102 (1997).

to agree to abide by campaign spending limits and to limit their acceptance of contributions from out-of-state donors.[137] No single station would have had to provide more than fifteen minutes of free time; and candidates would have been required to use the time in segments of not less than thirty seconds or more than five minutes.[138] Within a certain prescribed time before an election, the bill would in addition have required stations to sell broadcast time to eligible candidates at 50 percent of the station's "lowest charge . . . for the same amount of time for the same period on the same date."[139]

The Slaughter Bill. In March 1997 Representative Louise Slaughter, a Democrat from New York, introduced H.R. 84, the Fairness in Political Advertising Act. In exchange for receiving or renewing a broadcast license, the act would have required broadcasters to offer free TV time to candidates for statewide or federal office.[140] Stations would have been required to offer an equal amount of free time per candidate, but not less than a total of two hours and in units of not more than five minutes and not less than ten seconds. No broadcaster would have been required to provide more than four and a half hours per week. Candidates would have been required to speak directly into the camera.[141]

Free TV for Straight Talk Coalition. The privately organized Free TV for Straight Talk Coalition, founded by former *Washington Post* reporter Paul Taylor, has joined with a group of scholars—Norman J. Ornstein of the

137. *Id.* at § 503.

138. *Id.* at § 502.

139. *Id.* at § 103.

140. H.R. 84, 105th Cong., 2d Sess. § 2(a) (1997).

141. *Id.* at § 2(c).

American Enterprise Institute, Thomas E. Mann of the Brookings Institution, Michael J. Malbin of the State University of New York at Albany, and Anthony Corrado, Jr., of Colby College—in endorsing the creation of a "broadcast bank." Although the "broadcast bank" proposal has taken a number of slightly different forms, its broad outlines have remained essentially as follows. Every radio and TV station in the country would be required to contribute at least two hours of prime spot time each two-year election cycle. The contributions would be deposited into a broadcast bank. They would be assigned a monetary value based on market rates where they originated, and the bank would distribute vouchers denominated in money to the Federal Election Commission, which would in turn dispense them. Half the value of the vouchers would go directly to House and Senate candidates who qualified for them by raising over a threshold amount in small contributions from their own districts or states, and the other half would go to the parties, which could distribute the vouchers as they deemed most prudent, given their electoral prospects and the relative strengths and weaknesses of their slates of candidates. Candidates and parties could use the vouchers at any stations they wished, but no message could be less than sixty seconds long. The candidate would be required to appear on screen for the duration of the TV message, and the candidate's voice would be required for radio messages. At the end of every election cycle, the bank would reimburse stations that redeemed more than two hours' worth of free time with proceeds that it would collect from stations that redeemed less. Candidates wishing to purchase time outside the broadcast bank system would be free to do so, but at full market rates: the existing requirement that broadcasters charge political candidates the lowest unit rate for paid political advertising would be repealed.[142]

142. *New Campaign Finance Reform Proposals for the 105th Congress* (issued Dec. 17, 1996; revised May 7, 1997); Reforming Campaign Finance, BROOKINGS HOME PAGE, http:/www.brookings.org/gs/newcfr/reform.htm. One version of the broadcast bank plan plays a variation on that theme. It would finance the plan by an explicit trade-off, repealing the lowest unit rate requirement and in return assessing each broadcaster a fee, payable in "dollars or minutes," on all political advertising the broadcaster sells, with revenues going to the broadcast bank. Norman J. Ornstein, *Forget Sweeping Reform: Here Are 5 Realistic Changes*, ROLL CALL, Jan. 9, 1997, at 34.

The Assessment. For the reasons detailed earlier, all the free TV proposals are constitutionally vulnerable. A brief recapitulation of why that is so will serve to emphasize the point.

In Fifth Amendment terms, the proposals push the government ownership claim to the breaking point. On the most rudimentary functional economic analysis of how the licensing system actually works and is administered, the free TV mandates would constitute a taking of property. By requiring that broadcasters forgo substantial income from the sale of broadcast time during the license period, or by assessing broadcasters a "fee" derived solely from their sales of political ads and devoting it solely to funding candidate time, each of the free TV proposals not only would constitute an obviously coercive wealth transfer but also would unacceptably disrupt the broadcasters' legitimate, government-induced, investment-backed expectations.

In First Amendment terms, and looking initially at their impact on broadcasters' rights, the proposals all raise serious concerns even if the Court continues to adhere to *Red Lion*'s broadly discredited scarcity fiction. That is so because each of the post-*Red Lion* cases in which the Court gave its blessing to government-imposed content requirements is distinguishable in fundamentally important ways from the free TV mandates. If the Court were to play one or another of the variations on the ownership theme to analyze the broadcasters' First Amendment rights, the

result might be somewhat more in doubt, but only because a Court willing to take the spurious ownership claims seriously would thereby signal its willingness to ignore basic First Amendment principles. If the Court, on the other hand, were to abandon *Red Lion*, reject the ownership metaphor, and analyze the free TV mandates as though broadcasters enjoyed the same First Amendment rights as members of the print media, the mandates would almost surely succumb to the broadcasters' First Amendment challenge. Among other causes for constitutional skepticism is the fact that the governmental interests that free TV would supposedly advance are either impermissible or ill-served by the scheme.

In addition, all the proposals would, in one way or another, violate candidates' First Amendment rights. McCain-Feingold would do so by impermissibly and without adequate justification requiring candidates to sacrifice their right to spend their own resources to advocate their own election; it would also unjustifiably dictate the format of candidate speech. Both the fairness in political advertising proposal and the broadcast bank proposal would do so by dictating in even more intrusive and impermissible detail the format of candidate speech. The broadcast bank proposal, in addition, would condition candidates' receipt of vouchers on their raising certain kinds of contributions from in-state supporters. The condition has no apparent connection to the "reduce the cost of campaigning" and "make political discourse more substantive" goals that the proposal is touted as serving.

Its proponents often portray free TV as something of a panacea—a practically painless cure for practically all of our campaign-financing woes. They should be more skeptical about the idea that they have so enthusiastically embraced. In all its incarnations it is almost certainly unconstitutional. For any embodiment of it to pass constitutional muster, the Court would have to suspend quite completely

its usual disbelief with regard to regulations that govern political speech. In addition, it would have to permit itself to become the victim of a constitutional shell game. While the arguments on behalf of free TV may permit doctrinal *is* to *appear* to be dotted and the *t*s to be crossed, closer analysis shows that they misconceive the fundamental premises of both the First and the Fifth Amendments.

In policy terms, too, free TV has serious weaknesses. First, the goals it claims to pursue are impermissible objectives for a government in a free society. Second, it is unlikely that free TV would in fact come anywhere close to achieving its posited objectives. Third, "free" TV is not free; neither does it represent—as its supporters try to imply—a *public* subsidy provided by *public* funds. Instead, it represents a subsidy provided by *broadcasters*.

Those three weaknesses might be enough to condemn the idea to oblivion, but there is a fourth: no matter what scheme of free TV were to be adopted, implementing the free TV mandates would be an administrative nightmare. All the free TV proposals and all the optimistic urgings on their behalf by their supporters imply through silence about administrative details that free TV would be practically self-executing. Proponents insinuate that getting the time slots in equitable portions *from* the broadcasters, allocating them *to* the appropriate federal candidates, and then making arrangements so that the eligible candidates actually get *on the air with the required format and the suitably crafted message in the relevant market* are simple tasks, easily accomplished merely by ordering them to be done.

Proponents of free TV also imply that enforcement would be without cost or complexity, whether the task be assigned to the Federal Election Commission or to the FCC. The truth is completely otherwise, however, as a moment's reflection will reveal. Consider the range of quid pro quos that the mandates contemplate, multiply them by the number of candidates for federal office, and you will

have a sense of the sheer number of enforcement issues that might arise. Divide the number of hours of free time, again by the number of federal candidates deemed eligible to receive the benefit, and you will discern a second layer of complexity. Understand that all those enforcement tasks will be assigned to government officials and think carefully about the intensity of monitoring that ensuring compliance will require. You will understand and quite likely share the fear of its freedom-loving opponents that "free TV" will inevitably entail a very significant expansion of government intrusion into and control of core political activity.

Conclusion

The claims of free TV's supporters obscure each of the policy weaknesses. That is a somewhat surprising fact, given the concern they so often express about misleading campaign ads and the quality of campaign discourse. As the debate on free TV progresses, however—whether it takes place in legislative chambers or in courts or in the hearings of administrative bodies—the idea's proponents have an obligation to drop some of their rhetorical camouflage and forthrightly to address those very significant substantive issues.

In addition, the severity of the constitutional concerns that the free TV proposals raise should worry not just lawyers and judges, nor should only potential opponents of the proposals address them. The constitutional analysis should disconcert proponents of free TV too, because the constitutional problems do not merely represent artifacts of dry and lifeless legal doctrines. To the contrary, the problems arise because the proposals themselves are to a disturbing extent inconsistent with traditions and values that many if not most Americans revere deeply, despite whatever misgivings they may have about negative campaigning and the costs of running for political office.

Political freedom and a collective unwillingness to cast the burdens of public improvements on the few rather than the many are traits that have characterized American democracy since the founding of the Republic. The free TV proposals would put both traits at grave risk.

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APPENDIX B

Public Interest Council

Free Airtime for Candidates and the First Amendment

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Among the sideshows in the debate over campaign finance reform are various proposals that would require television broadcasters to provide free air time to political candidates. These proposals, packaged in various shapes and sizes, are not just bad ideas: They violate constitutional law.

As Oliver Wendell Holmes quipped, certitude is not the test of certainty, and the skeptic is entitled to ask what exactly is meant by the cocksure assertion that governmentally mandated free air time would violate the Constitution. Is this a slam dunk? Do existing constitutional doctrines clearly make such proposals unsound? Or is this merely an advocate's assertion, a prediction that, when put to the test, courts *would* strike such programs down, and moreover, *should?*

The answer is a blend. Some of the current suggestions being floated about town would clearly run afoul of well-established First Amendment precepts. Others would be in sharp tension with the animating principles of modern First Amendment law, and would very probably be struck down by judges sensitive to those principles. Free air time may be a popular project with some very thoughtful and altruistic reformers, but it is up against the gathering momentum of numerous First Amendment doctrines and, in any judicial test, would almost certainly fail.

Proponents of free air time base their constitutional justification for their proposals primarily on two related notions. On the broadest level, proponents invoke the idea that broadcasters are "public trustees" who may be regulated by government in "the public interest." More narrowly, they argue that free air time may be imposed on broadcasters as a quid pro quo in exchange for the grant to broadcasters of additional spectrum space for digital television. These justifications may sound plausible to some at first blush, but they do not hold up when analyzed against prevailing First Amendment norms. Several discrete aspects of contemporary First Amendment law would be placed in play by free air time proposals.

I. Unconstitutional Conditions

First, the proposals trigger the century-old constitutional doctrine of

"unconstitutional conditions." There was a time when American constitutional law was captive to what was known as the "right / privilege" distinction. Americans had certain constitutional "rights," such as freedom of speech or the free exercise of religion. But Americans had no right to government largess, such as government jobs, public education, welfare benefits, franchises, or licenses. These were deemed mere "privileges." The government could attach whatever strings or conditions it wanted to the receipt of these privileges. The recipient had the choice of accepting the government benefit with its conditions attached, or declining the benefit. It was a world of "beggars can't be choosers, don't look a gift horse in the mouth, learn to accept the bitter with the sweet."

This harsh regime, however, was long ago modified by the doctrine of unconstitutional conditions. In a series of landmark Supreme Court rulings, it was held that government did not have a free hand to impose any conditions it wanted on the receipt of public benefits. Some conditions were unconstitutional. A collection of restraining principles evolved, limiting the power of government. Americans now *could* look a gift horse in the mouth. Several of these limiting principles are directly relevant to free air time proposals.

- The Supreme Court has drawn a distinction between restrictions imposed by the government that relate to the government's own speech, and restrictions imposed when the government is empowering or subsidizing private speakers. When the government itself is entering the marketplace of ideas, through the speech of its own employees or contractors, it has substantial power to control the content of the message _ since the message, by hypothesis, is supposed to be the government's own. But when the government is merely enabling private speakers to express their views in the marketplace, by providing the forum for that speech or subsidizing it in some manner, government's power to manipulate the content of the speakers' messages is drastically limited.

In its 1995 decision in *Rosenberger v. University of Virginia*,[1] for example, the Supreme Court held that the University of Virginia could not withhold funds from a student religious publication when it funded other student publications and activities. The Court rejected the simple-minded assertion that the university could do what it wanted with its own scarce resources, holding that once it entered the business of funding student publications, it could not discriminate among various viewpoints. The Court heavily emphasized the distinction between the university controlling its own speech, and the university controlling the speech of private speakers who sought to participate in its subsidy program. In a key passage the Court stated:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private

> entities to convey its own message. In the same vein, in *Rust v. Sullivan* we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes....It does not follow, however... that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

This passage from *Rosenberger* exposes the deep constitutional fissure in free air time proposals. Yes, the government may have licensed broadcasters to use the electronic spectrum. But it is not the government *itself* that is doing the broadcasting. Rather, the government has created its system of licensure to distribute frequencies efficiently and to promote a diversity of voices among private speakers, who maintain their rights under the First Amendment to choose for themselves what they will or will not say.

- A second related restraining principle is the "professionalism" notion. State university professors, for example, are government employees, and their research is often government funded. When legislative bodies attempt to dictate what professors may teach and research at too great a level of specificity, however, principles of academic freedom kick in to insulate the professor from such controls. Public libraries and public schools are funded with tax dollars. But the Supreme Court has held that there are limits to the power of government to remove books from them. A librarian applying professional norms for shaping and maintaining a collection has great freedom to make such choices. But there are First Amendment limits on the power of a political body, such as a school board, to interfere with those choices in order to advance a particular viewpoint agenda. If these limits exist when political bodies attempt to exert control down the government "chain of command," so to speak, they are all the more powerful when the government's orders are issued to outsiders such as broadcasters, who are linked to the government only by virtue of the licenses they hold.

- A third limiting principle is the "nexus" requirement. The Supreme Court requires a substantial relationship between the benefit being granted and the "string" being attached. When a zoning board grants a license for a hardware store to expand its business, for example, it is permissible to attach the condition that the lot be landscaped to handle additional parking needs, and to deal with extra water runoff caused by paving. But the Supreme Court held in 1994 that it was not permissible for the government to impose a requirement that the hardware store owner create a walking

and cycling path through a "greenway" across the property, no matter how attractive and altruistic the policy goal of creating such paths might be. This was a gratuitous condition, the Court held, not sufficiently related to the expansion permit.

So too, the government may not impose a "political greenway" on broadcasters. The government would only be justified in attaching "strings" to the grant of new spectrum space for digital broadcasting if those strings bear some substantial relation to the grant. The government is not free to simply pick out of the sky nice-sounding policy objectives like free air time and impose them on broadcasters because it has granted those broadcasters additional spectrum. Indeed, there is absolutely no logical nexus between digital broadcasting and political campaigns. There is nothing about changing the technical method of broadcasting that has anything whatsoever to do with the *content* of what is broadcast, let alone content defined specifically as "speeches by candidates."

- Fourth, the government cannot presume to attach conditions to benefits that are not in fact benefits. It is not at all clear that the grant of additional spectrum space was a "benefit" to broadcasters *at all*. The conversion to digital broadcasting, it now appears, will probably cost broadcasters more than they are likely to recoup. There's no *quid* to the *quid pro quo*.

The proponents of free air time may have high-minded objectives. But the device of attaching strings to government benefits has, throughout our country's history, almost always been a vehicle for suppressing civil liberties. The attempt to use this device as the fulcrum for forcing broadcasters to grant free air time places free air time proponents on the wrong side in the march of constitutional history.

II. The Constitutional Status of Broadcasters

Free air time proposals place in issue the constitutional status of broadcasters. There are two models at war here. Under one view broadcasters are a sort of partner with government, engaged in a joint venture encapsulated in the catch-phrase "public trustee." Government should attempt to elevate public discourse, the argument goes, and broadcasters should participate in that noble endeavor. Broadcasters are thus seen as "public discourse utilities" who may be regulated according to whatever current policy vogue is deemed in the public interest.

A competing model sees broadcasters as independent journalists, with freestanding First Amendment rights to "call 'em as they see 'em" without government interference. This model contemplates an arms-length tension between government and broadcasters, the same healthy tension that has traditionally dominated the American conception of journalists as watchdogs who occupy their own autonomous role in the system of checks and balances. This second model, of broadcasters as free agents with editorial autonomy and journalistic freedom, now dominates the

constitutional landscape.

It is at this juncture that proponents of free air time proposals ritually incant the Supreme Court's 1969 decision in *Red Lion Broadcasting Co. v. FCC*,[2] imposed specific and confined obligations on broadcasters to provide opportunities for persons to respond to personal attacks and present opposing viewpoints. *Red Lion* has been much-roasted in recent years by judges and scholars. It is doubtful that the Supreme Court would adhere to the ruling in *Red Lion* if it were presented with the issues in that case again. More importantly, Red Lion was an extremely narrow holding, made even narrower by subsequent Supreme Court rulings. Whatever lingering vitality *Red Lion* may have, it is certainly not enough to support incursions on the independence of broadcasters as sweeping as mandatory free air time for candidates. Time and technology have passed *Red Lion* by:

- The fairness doctrine itself no longer exists. It was wisely abandoned by the FCC because it was deemed unnecessary and counterproductive. The Commission, in a decision affirmed by the courts,[3] ruled that the fairness doctrine does more to harm First Amendment values than to promote them.

- Red Lion was predicated on the notion of "spectrum scarcity." There were many voices clamoring to be heard and not enough broadcast channels to carry them all. Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes _ through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression. Pundits such as Norman Ornstein, one of the major proponents of free air time, can be heard day and night commenting on the issues of the times by anyone with a remote control and the willingness to surf. For every point in modern politics there is a cacophony of counterpoints. Political candidates are not wanting for the means or the media from which to project their messages.

- The Supreme Court has cautiously backed away from Red Lion. Because the FCC has abandoned the fairness doctrine, the Court has had no necessary occasion to revisit the case. But in numerous pronouncements the Court has clearly repudiated the "partnership" model for broadcasting. In *CBS, Inc. v. Democratic National Committee*,[4] for example, the Court observed that Congress sought to retain a "traditional journalistic role" for broadcasters, and had "pointedly refrained from divesting broadcasters of their control over the selection of voices."

- There is no sense of "joint venture" when Sam Donaldson grills Bill Clinton about Monica Lewinsky. We have become so accustomed to the independence of broadcasters that we may at times forget its importance; that independence becomes as natural and as unnoticed as the air we breathe. This separation of journalism from government, however, is part

of the genius of our constitutional democracy. Like other separations in our system _ separation of church and state, separation of civilian control over the military _ the maintenance of distance between the press and government divides power and prerogative, promoting balance and accountability. We would be a vastly different society without it.

III. Neutrality and Forced Speech

Once it is understood that neither the "right / privilege" distinction nor the "public trustee" concept is sufficient to disqualify broadcasters from First Amendment protection, mandated free air time proposals run smack into a number of the most potent doctrines in modern constitutional law.

• Neutrality is the lodestar principle of modern First Amendment jurisprudence. The government is not permitted to regulate speakers according to its own views of what is "good" speech and what is "bad." Many of the proposals for free air time blithely ignore this fundamental dictum. Some, for example, presume to restrict what candidates using the free time could say, barring "political attacks" and requiring that the time be used for the presentation of positions on "issues." But the First Amendment absolutely bars government from the arrogant enterprise of deciding what speech is appropriate in political discourse. Indeed, the First Amendment does not even permit the government to presume to determine what is an "attack" and what is an "issue," as if those two notions could ever be meaningfully distinguished by the government bureaucrats who would enforce the law.

• A transcendent principle of modern First Amendment thinking, cutting across a wide variety of contexts and topics, is the prohibition on "forced speech." Government normally is not permitted to force speakers to carry the messages of others, even when the government owns or operates the medium through which the speech is being expressed. Thus the government owns main street, and a group wishing to use the street to stage a parade on St. Patrick's Day must obtain a permit to do so. But once a private group is granted the right-of-way, the government is forbidden under the First Amendment from dictating who will be allowed to march. This was the learning of the Supreme Court's 1995 decision in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*,[5] in which the Court held that Massachusetts could not force a private group of parade organizers to include gay, lesbian, and bisexual marchers, even though their exclusion was mean-spirited and discriminatory. "While the law is free to promote all sorts of conduct in place of harmful behavior," the Court admonished, "it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."

IV. Campaign Reform and *Buckley v. Valeo*

Free air time proposals are currently being advanced as part of the larger

agenda of political campaign reform, an agenda that implicates the Supreme Court's historic 1976 ruling in *Buckley v. Valeo*,[6] striking down aspects of the Federal Election Campaign Act of 1971 and upholding others. *Buckley* is a First Amendment thicket, growing thicker and thicker. Many Supreme Court rulings since 1976 have elaborated on *Buckley* and it is clear enough that public funding of election campaigns is not *per se* unconstitutional. But there is a world of difference between public funding of campaigns, and the commandeering of the air time of broadcasters. It is one thing, under the First Amendment, for the government to give candidates money to buy their own time on television. It is quite another to cross the line of separation between the government and the media, and forcibly impose free time obligations on broadcasters.

In a 1990 decision that is often overlooked, *Austin v. Michigan Chamber of Commerce*,[7] the Supreme Court actually explored the question of whether the press can be swept in and made part of the regime of political campaign reform. The case involved a Michigan law restricting corporate political expenditures. The law contained an exemption, however, for media corporations. The Supreme Court not only held that the exemption was permissible, but seemed to signal that the law would *not* have been upheld *had* it been applied to the press. The Court emphasized the "unique role" the press plays in our system, stating that the "press serves and was designed to serve as a powerful antidote to any abuses of power by government officials."

V. Conclusion

The mandated free air time bandwagon should not be permitted to start a roll. Free air time sounds good to some when they first hear of it. The idea is altruistic and catchy. But it is an idea out of touch with reality and out of synch with the First Amendment. There are many practical problems with free air time, among them the simple fact that you can put candidates on television but you can't make people watch. More importantly, mandated free air time is a First Amendment nightmare. There are many thoughtful proposals for reforming American politics in a manner consistent with our First Amendment tradition. Free air time is not one of them.

Notes

[1] *Rosenberger v. University of Virginia*, 115 S. Ct. 2510 (1995).

[2] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[3] *See* 1985 Fairness Report, 102 F.C.C.2d 145 (1985); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

[4] *CBS, Inc. v. Democratic National Comm.*, 412 U.S. 94 (1973).

[5] *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995).

[6] *Buckley v. Valeo,* 424 U.S. 1 (1976).

[7] *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990).

The Author

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His book *Free Speech in an Open Society* (Alfred A. Knopf, 1992) won the William O. Douglas Award as the year's best monograph on freedom of expression. He was the editor of *A Year in the Life of the Supreme Court* (Duke University Press, 1995), which won an ABA Silver Gavel Award. His book *Suing the Press: Libel, the Media, and Power* (Oxford University Press, 1986) won the ABA Silver Gavel Award Certificate of Merit. He is also the author of *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press, 1988). He is the author of three treatises: Smolla and Nimmer on Freedom *of Speech* (West Group, two volumes, 1996); *Federal Civil Rights Acts* (West Group, two volumes, 1994); and *Law of Defamation* (West Group, 1986), and co-author of a casebook on constitutional law: *Constitutional Law: Structure and Rights in Our Federal System* (with Banks and Braveman, Matthew Bender, 1996).

Issues in Broadcasting and the Public Interest

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The Media Institute is a nonprofit research foundation in Washington, D.C., specializing in communications policy and First Amendment issues. The Institute advocates and encourages freedom of speech, a competitive communications industry, and excellence in journalism.

APPENDIX C

THE UNCONSTITUTIONALITY OF FEDERALLY MANDATED "FREE AIR TIME"

A Summary Prepared for
The National Association of Broadcasters
for Presentation at a Meeting of the Presidential Advisory Committee
on Public Interest Obligations of Digital Television Broadcasters

University of Southern California

March 2, 1998

P. Cameron DeVore
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SUMMARY

"Free air time" is the current mantra of many earnest and well-meaning critics of America's campaign finance practices. Its proponents blame the cost of television advertising for the perceived problems with our campaign finance system, and they propose "free air time" as a kind of universal solvent, touted to be a cure for almost every election malaise ranging from incessant high pressure solicitation, to negative campaign advertising, to declining voter participation and growing voter cynicism.

However, strictly as a matter of First Amendment analysis it is impossible to escape the conclusion that a "free air time" mandate would be subjected to strict First Amendment scrutiny and struck down by the courts. Indeed, even if lesser scrutiny[1] were

[1] Strict scrutiny requires government to prove a compelling interest, directly advanced by the least restrictive regulatory means. See, e.g., Reno v. ACLU, 117 S.Ct. 23, 29 (1997). So-called "intermediate scrutiny" imposes the somewhat lesser burden on government to prove a substantial interest, directly and materially advanced by means no more extensive than necessary. One version of the intermediate scrutiny test is for content neutral regulations imposing only a secondary impact on speech, as set forth in United States v. O'Brien, 491 U.S. 367 (1968) (federal ban on burning draft cards upheld, as cards integral to

to be applied, the government would be equally unable to meet its heavy burden of proving not only that the goals of "free air time" are both real and substantial when weighed in the balance against First Amendment values, but also that mandated "free air time" would "directly and materially" advance those goals.[2]

Indeed, the daunting problem that must ultimately be addressed by proponents of "free air time" is that the concept relies on a naked governmental directive to America's broadcast media to air core political speech not of their choosing, but instead selected by candidates and defined by government fiat. As set forth below, merely intoning with great certitude the question-begging citation of Red Lion[3] or the practically and legally "empty"[4] assertion that broadcasters are, in effect, merely squatters on the public's spectrum, will not suffice to save "free air time" from its many constitutional infirmities

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selective service system); also see Turner Broadcasting Co. v. FCC, ("Turner II") 117 S.Ct. 1174 (1997) (upholding under O'Brien the federal "must carry" requirement imposed on cable television industry). Another version of intermediate scrutiny is exemplified by the Court's test for regulation of commercial speech as defined in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). Lesser so-called Red Lion scrutiny, applied to uphold the FCC's fairness doctrine by the Supreme Court in 1969, is discussed at p. 15, below.

[2] See p. 47-49 of Professor Lillian R. BeVier's monograph, "Is Free TV for Federal Candidates Constitutional?", American Enterprise Institute, Washington DC, 1998 (attached to this summary as Exhibit A):

> If the [Supreme] Court takes at all seriously its obligation to call what appears from the present state of the evidence to be a rhetorical bluff of free TV's proponents – if it truly requires them to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way," [citing Turner Broadcasting v. U.S. ("Turner I"), 512 U.S. 622 at 664 (1994)], the proponents will have to come up with well-founded answers to [Professor BeVier's challenging observations about the ephemeral effects that "free air time" would have on the plethora of ills asserted by its proponents in justification of the concept]. They will, in other words, have to offer a defense much more solid than the vague generalities and unsupported assertions about causes and effects that they have offered so far.

[3] Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969), discussed at p. 15, below.

[4] BeVier, supra, at 4.

under the most fundamental and well-established principles of First Amendment jurisprudence.[5]

I. FEDERALLY MANDATED "FREE AIR TIME" WOULD BE IMPERMISSIBLE UNDER THE FIRST AMENDMENT

As set forth below, nothing in Red Lion – even assuming that this 1969 decision of the Court rendered at the dawn of the modern era of exploding technological multiplication of both spectrum and of other electronic media retains any legitimacy today — should support the imposition of a "free air time" requirement or prevent the application of the First Amendment guarantee of virtually absolute editorial freedom to the broadcast media.[6] Indeed, virtually absolute editorial freedom lies at the heart of First Amendment protection, and "free air time" proposals run squarely into a First Amendment wall. Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, 115 S. Ct. 2338, 2350 (1995); Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

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[5] See Professor BeVier's thorough analysis of the "ownership-of-spectrum" argument in Exhibit A, p. 4-13. The "ownership" trope is no more persuasive, factually, than would be an argument that because newspaper newsracks are almost always on public property—and are as essential to newspaper distribution as is spectrum to the broadcasters, the newspapers thereby give up editorial control to some form of government regulation. Also see comments of Williams, J., dissenting from denial of rehearing *en banc* in Time Warner Entertainment Co. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) ("There is, perhaps, good reason for the [Supreme] Court to have hesitated to give great weight to the government's property interest in the spectrum.")

[6] See remarks at p. 3 of "Free Air Time for Candidates and the First Amendment," by Professor Rodney A. Smolla, filed with the Advisory Committee this week:

> [Red Lion] dealt with the question of whether, in the absence of government mandates, the views of some might not be reflected on broadcast stations. No one could argue that the views of candidates for political office are not widely available on broadcast stations now, both through news and other free coverage and through the sale of advertising time. Thus, free time proposals do not flow from any claimed scarcity of electronic voices and cannot rely on Red Lion for constitutional support. "Spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory." Syracuse Peace Council v. FCC, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J. concurring), *cert. denied*, 493 U.S. 1019 (1990).

Also see further Red Lion analysis at p. 15 below.

Also, the free time requirement would force broadcasters to provide time to candidates to be used as the candidates choose, or in a manner prescribed by federal fiat. The First Amendment would impose an insuperable burden on the government to prove that such a content-based requirement did not infringe First Amendment freedoms. See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1991). Such a law could be justified under the First Amendment only by a showing of a compelling interest, directly advanced by the mandate, and not capable of being advanced through alternatives that do not encroach on the editorial discretion of the broadcaster.

Historically, broadcasters have been subject to more restrictions than have other media on their constitutionally protected editorial discretion, but the late-60's rationale of spectrum scarcity no longer justifies singling out broadcasters for reduced First Amendment protection. As also discussed below, compelling broadcasters to finance political campaigns would bear no direct relationship to broadcasters' traditional public interest duties, and would upset the delicate balance between their journalistic freedoms and their obligations as licensees of the public airwaves.

A. A "Free Air Time" Mandate Impermissibly Would Require Broadcasters to Engage in Compelled Speech.

1. Government May Not Mandate Political Speech Absent Compelling Necessity and Precise Tailoring.

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and

adherence." Turner Broadcasting System, Inc. v. F.C.C. ("Turner I"), 512 U.S. 622, 639 (1994) (plurality op.).

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, 115 S. Ct. 2338, 2350 (1995) (citation omitted); accord, Pacific Gas & Electric Co. v. California P.U.C., 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

In no category of speech are these principles more important than political speech. Political speech – and particularly speech by or concerning candidates for office -- is at the core of First Amendment protection. McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1518 (1995); First National Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978); Buckley v. Valeo, 424 U.S. 1, 14 (1976). The fact that broadcasters are paid for airing political advertisements in no way diminishes this First Amendment protection or transforms either paid or voluntary political speech into speech entitled to less constitutional protection. Bellotti, 435 U.S. at 776-77; and see New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (full protection for advertisement on political subject).

Government preference for, or prohibition of, political speech or indeed any other category of speech based on its content is particularly repugnant to the First Amendment.

FCC v. League of Women Voters, 468 U.S. 364, 383 (1984); Consolidated Edison Co. of New York v. Public Service Comm'n of New York, 447 U.S. 530, 537 (1980). Content-based regulation is subject to the most stringent First Amendment scrutiny. Congress may "not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." Riley v. National Federation for the Blind, 487 U.S. 781, 800 (1988); accord, e.g., Texas v. Johnson, 491 U.S. 397, 412 (1989); Boos v. Barry, 485 U.S. 312 (1988); Pacific Gas & Electric Co. v. California P.U.C., supra, 475 U.S. at 19. Proponents of "free air time" cannot seriously contend that such a mandate would be accorded some lesser First Amendment protection because it is allegedly "content-neutral" or "viewpoint-neutral." As Professor BeVier notes in her attached monograph,

> what might matter most is that the ["free air time"] mandates are speaker-identity, subject-matter, and format-specific. True, the mandates do not single out particular viewpoints for more or less favorable treatment. Apart from the fact that they lack that inevitably fatal flaw, it is hard to imagine regulations that would be less content-neutral; looked at through the lens of what they require of candidates to become entitled to their benefits, they not only prescribe the generic class of qualified speakers (certain candidates for federal office) but also dictate the subject matter and the format of the speech.

BeVier, Exhibit A, at 38-39.[7]

"Free air time" would represent just such content-based regulation, requiring broadcasters to provide free broadcast time to candidates for federal office just prior to

[7] Also note Professor BeVier's final conclusion on the content-neutral point, Exhibit A at 40, that the "free air time" mandates would "embody such intrusive, particularistic, and overbearing governmental judgments regarding the conduct of political campaigns that the [Supreme] Court will almost certainly insist on a painstaking and skeptical evaluation of the goals they supposedly serve and their aptness as means. As most Court watchers know, scrutiny that is strict in theory is almost always fatal in fact. "